Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 8, 2018

CLAIM NO. 201680673

KOCH'S COVE EXCAVATING & CONSTRUCTION — PETITIONER/CROSS-RESPONDENT

VS. **APPEAL FROM HON. CHRISTINA D. HAJJAR, ADMINISTRATIVE LAW JUDGE**

KIMBERLY TYLER (ADMINISTRATRIX) OF THE ESTATE OF KENNETH S. RATLIFF, DECEASED, AND THEODORE SAUER, GUARDIAN — RESPONDENT/CROSS-PETITIONER

and HON. CHRISTINA D. HAJJAR, ADMINISTRATIVE LAW JUDGE — RESPONDENT

OPINION
AFFIRMING IN PART, VACATING IN PART ON APPEAL,
AND REMANDING &
AFFIRMING ON CROSS-APPEAL
* * * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

STIVERS, Member. Koch's Cove Excavating & Construction ("Koch's Cove") appeals and Kimberly Tyler, widow and Administrator of the Estate of Kenneth Ratliff ("Estate") cross-appeals from the January 11, 2018, Opinion, Award,

and Order and the February 15, 2018, Order on Petition(s) for Reconsideration of Hon. Christina Hajjar, Administrative Law Judge ("ALJ"). In the January 11, 2018, Opinion, Award, the ALJ ordered payment of a lump sum death benefit to the Estate of $78,446.51; $84.77 per week to Kimberly Tyler, Kenneth Ratliff's ("Ratliff") widow, starting on June 9, 2016, and continuing during widowhood pursuant to KRS 342.750; and $28.26 per week to Theodore Sauer, as Guardian for Jessica Ratliff and James Ratliff, the children of Ratliff, pursuant to KRS 342.750(e).

On appeal, Koch's Cove sets forth five arguments, four of which are presented as sub-arguments made under argument one concerning the calculation of Ratliff's average weekly wage ("AWW"). First, Koch's Cove asserts that, because Ratliff was initially hired in 2014, he was in the employ of Koch's Cove for more than 13 weeks. Second, Koch's Cove asserts the ALJ erred by determining Ronald Moore ("Moore") was a similarly situated employee. Third, Koch's Cove asserts the ALJ erred by using the entirety of Moore's second quarter wages in arriving at an average number of weekly hours worked, because the majority of Moore's second quarter wages were earned after the June 9, 2016, accident. Fourth, Koch's Cove asserts that because Ratliff was in the employ of Koch's Cove from April 8,

2016, through June 9, 2016, his actual wages should have been used in calculating the AWW instead of Moore's earnings. Fifth, Koch's Cove asserts the ALJ erred in not limiting the widow's death benefits in light of the decision in Parker v. Webster County Coal (Dotiki Mine), 529 S.W.3d 759 (Ky. 2017).

On cross-appeal, the Estate asserts two arguments. First, the ALJ erred in not utilizing KRS 342.140(1)(f) in calculating the AWW, as Ratliff's wages could not be ascertained. Next, the Estate asserts any award of weekly death benefits made to the widow and two dependent children should equal $159.72 which represents the minimum AWW in 2016.

The Form 101 indicates Ratliff was killed on June 9, 2016, when his vehicle ran off the road and he sustained blunt force trauma. On the Form 104 attached to the Form 101, "dates unknown" is written under "Period of Employment" for Koch's Cove.

In the October 10, 2017, Benefit Review Conference Order and Memorandum, the following contested issues are listed: AWW, benefits pursuant to KRS 342.732, KRS 342.750, and identity of beneficiaries.

The Estate filed the U.S. Bureau of Labor Statistics indicating wages for various occupations in the

Jefferson County Metropolitan Statistical Area for May 2016. For "construction and extraction," a mean hourly wage of $21.86 per hour is depicted.

Steve Koch ("Koch"), the owner and operator of Koch's Cove, was deposed on October 3, 2017. His company is involved in general construction. He testified regarding his first meeting with Ratliff:

> A: It was probably in 2014, would be my best recollection. My wife worked with his mom at UPS. And around this time I think is when Shane was going through a lot of stuff and he needed some work.[1]
>
> So his mom asked my wife if I could use Shane on some jobs. And at that point, I was needing some part-time help. So I met Shane, and the exact day I don't know, at McDonald's in Middletown, and we talked for an hour. And that was the first time I ever met Shane.
>
> Q: How would you typically hire Shane? Would you call Shane, or would Shane call you?
>
> A: The majority of times, it would be Shane would call me looking for work. I'm sure there are times when I called. When you get desperate for help, you call, you know.
>
> So I would call people that I knew that might be available, and that would be the way I've always done it up until the last year and a half or so.

[1] Shane is Ratliff's middle name.

Koch provided the following regarding the work to be performed on June 9, 2016:

> Q: Did you hire him to work on a job that he was working on June 9th, 2016?
>
> A: Yes.
>
> Q: Can you just describe what job that was?
>
> A: It was a client in the Crestwood, LaGrange area. It was a drainage project behind the client's house. I was installing a french drain in the backyard, approximate 100 feet of it, and so that is the job.
>
> Q: Do you remember how many days Shane worked on this job for you?
>
> A: June 9th was the day that he came to work for me that day.
>
> Q: Were you on the job site that day?
>
> A: Yes.
>
> …
>
> Q: I guess then Shane worked with you after you picked up the rock or the stone?
>
> A: Shane arrived on the job. He was dropped off at the job, and I do not remember who did drop him off.
>
> Q: What type of work was Shane doing that day?
>
> A: Laborer. He was strictly shovel, break. As a matter of fact, on June 9th, we were installing the pipe and putting the gravel down and doing that work.

Q: Was that the typical type of work that Shane would do for you, or would it just depend on the job?

A: It just varied by the job.

Q: At some point on June 9th, did Shane drive the dump truck that we've been talking about?

A: Yes.

…

Q: Did Shane then take the dump truck –

A: Yes.

Q: - to go about that?

A: Yes.

Q: Was there also a trailer attached to the dump truck?

A: Yes.

…

Q: When Shane took the dump truck to go trade out the stone for the dirt, do you remember how much stone was left in the dump truck?

A: Based on what I could judge, it was three to four ton of rock was [sic] left on the truck.

Q: Do you know how far Shane had to drive?

A: That I do not know. Shane – I had been at Shane's house one time, but it was easy to get turned around in that part of the country, because I'm not used to it, but that's – so I don't

think – well, I'm speculating. I don't know.

A 2016 W-2 was attached as Exhibit 4 to Koch's deposition which shows Koch paid Ratliff $258.00 that year. Ratliff was paid by check:

> Q: Just in general, how did you pay Shane? Was it by check, cash?
>
> A: By company check.
>
> Q: So you didn't have a payroll company or anything that you would pay your employees?
>
> A: No.
>
> Q: Is that the same way that you paid other employees as well?
>
> A: Yes.
>
> Q: Did you keep records of the company checks that you paid to Shane?
>
> A: Yes.
>
> …
>
> Q: Are these two check stubs part of your business checkbook that you keep in your records?
>
> A: Yes.
>
> Q: And you've provided an April 8th, 2016 check stub to Shane. Can you just interpret what this first April 8th check stub was for?
>
> A: That was Watterson Lakeview Apartment complex, and Shane helped me pour a concrete sidewalk section.

> Q: Did Shane work for you at all between April 8th and June 9th, that you can recall or that your records show?
>
> A: No.

Ratliff contacted Koch in late May and asked for work, and the June 9, 2016, job was the first job that came up after his request for work.

> Q: So between April 8th, 2016 and the next job that Shane worked on June 9th, did you consider him an employee during that time period, or did you rehire him for the June 9th job?
>
> A: Well, I'm not sure how to split the hairs on that one. I mean, he was – it depends on the definition of employee. I mean, he did not work for me on a regular basis. He was at the most a limited part-time employee.
>
> Well, I guess I use the term employee, I mean, he did not work for me on a regular basis. He was at the most a limited part-time employee.
>
> Well, I guess I use the term employee, I mean, because I had hired him before, so yes, I mean, he was a part-time employee.

The second check stub reflects a check was issued for $198.00, and that was for the work Ratliff performed on June 9, 2016, the date of the accident.

> Q: And I think if we do the math, you have written down 15.2 hours; is that correct?
>
> A: Right.

> Q: Was Shane paid – what was his hourly rate, I guess?
>
> A: $15.00 an hour.
>
> Q: If we do the math, that might have only been for 13 and a half hours?
>
> A: Yes.

Ratliff was drug-tested before he was hired to perform the June 9, 2016, job.

Koch's Cove had no full-time employees during the time period leading up to the June 9, 2016, accident, and health insurance was not offered to its employees. Koch testified that Koch's Cove used Moore, as-needed, for concrete work, and he was paid $20.00 an hour instead of $15.00 an hour because of his experience.

Koch's Cove employees and projects increased during the second quarter of 2016:

> Q: For quarter two in 2016 on your unemployment tax records, it looks like you paid quite a few more employees for the second quarter. Was there a reason for that, that you can remember?
>
> A: In late May or early June, I picked up a commercial rehabilitation project for a client. We were working – we were rehabbing the old Brooks Elementary School in Brooks, Kentucky, and that's when I started using – I hired several people at that point.
>
> Q: Were you working on that Brooks Elementary project at the same time as the french drain project?

A: I don't think so. I'm not fully certain, but I don't think work actually really got going on that job until more towards the latter part of June.

It seems like it was the end of May when I first talked to the client, and then it was a little bit of time getting things going.

…

Q: So that commercial job we referenced that started in June of '16, that continued for four or five months afterwards?

A: No, it continued – well, I just recently pulled off of it. What is the – August. The end of July, I pulled off of it.

Q: That was July of '16 or July of –

A: '17.

Q: So that job then continued on for a little over a year?

A: Yes.

Koch offered the following concerning Ratliff's continued employment had he not died:

Q: No reason that you know of that if Shane hadn't died, he could have continued to work on that job?

A: Not that I can think of.

Q: So you would have kept him on, but for his fatality?

A: Based on speculation, yes.

> Q: Well, not about speculation. You have no reason not to use him? It was the expectation he could have continued to help you on that job?
>
> I understand if he did something wrong, but on the day that he died, you had every intention on letting him continue to work for you through that project?
>
> A: Yes.

Among the documents attached to Koch's deposition are Koch's Cove's UI-3, "Quarterly Unemployment Wage and Tax Report," for the first and second quarter of 2016. The reports indicate Moore earned a total of $1,030.00 during the first quarter, and a total of $4,590.00 during the second quarter. Ratliff earned a total of $258.00 during the second quarter.

Also attached to Koch's deposition is Ratliff's 2016 W-2 indicating he earned a total of $258.00 from Koch's Cove. Likewise, a June 15, 2016, "Request For Wage Information" letter to Koch's Cove from Ladegast & Heffner Claims Service noting Ratliff was making $15.00 per hour was also attached.

In the January 11, 2018, Opinion, Award, and Order, the ALJ set forth the following findings regarding AWW:

Average Weekly Wage

The parties have produced limited evidence and records from which the ALJ can determine Plaintiff's average weekly wage. Pursuant to KRS 342.140, if the employee had been in the employ of the employer less than thirteen (13) calendar weeks immediately preceding the injury, his or her average weekly wage shall be computed under paragraph (d), taking the wages (not including overtime or premium pay) for that purpose to be the amount he or she would have earned had he or she been so employed by the employer the full thirteen (13) calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation. If the hourly wage has not been fixed or cannot be ascertained, the wage for the purpose of calculating compensation shall be taken to be the usual wage for similar services where the services are rendered by paid employees. KRS 342.140. The ALJ finds that Plaintiff was employed for less than 13 weeks (from April 8, 2016 through June 9, 2016), and thus, his wages shall be determined based upon what he would have earned had he been employed by Defendant for the full 13 weeks prior to the injury and had worked when work was available to other employees in a similar occupation.

According to the unemployment form from the 1st Quarter of 2016 (January, February and March), Robert Moore, Mr. Koch's other employee, made $1,030. Mr. Koch testified that Mr. Moore made $20 per hour, meaning that Mr. Moore worked on average 51.50 hours, or 3.96 hours per week during this time period. During the 2nd Quarter of 2016, (April, May and June of 2016), Mr. Moore made $4,590.00, or on average, 17.65 hours per week during this time period. The

ALJ has no other information from which to estimate the number of hours a similarly situated employee would have worked for the 13 weeks leading up to the accident, but believes this to be the best estimate of what hours were available to other employees in a similar occupation for purposes of calculating Ratliff's average weekly wage. The ALJ finds that Plaintiff's request for the ALJ to base Ratliff's average weekly wage on a 40 hour work week is not supported by the evidence, as there is no evidence that Plaintiff ever worked 40 hours a week for Mr. Koch or any other employer, or that any other employees averaged 40 hours while working for Defendant during this time period. The ALJ also finds that Defendant's argument that Plaintiff had an average weekly wage of $19.85 to be insufficient as Ratliff was not employed for a full 13 weeks.

In regard to the wage rate, the ALJ acknowledges that Plaintiff has filed evidence that a construction worker's wage for the Jefferson County Metropolitan Statistical area is $21.86 per hour. The ALJ also acknowledges that the information is reliable, and could be relied upon if Ratliff's wage rate could not be determined. However, in this case, the ALJ finds that the wage rate can be determined, and is $15 per hour. Mr. Koch testified that the $20 paid to Mr. Moore was more than what he paid Ratliff because Mr. Moore had more concrete experience. Mr. Koch testified that he paid Ratliff $15 per hour, which is consistent with the April 2016 paycheck, (although his June 2016 pay check indicated he made less per hour).

Taking into consideration the number of hours a similarly situated

> employee worked, and the $15 per hour wage rate, the ALJ calculates that Ratliff's average weekly wage to be $188.34.
>
> | | | #of hours | Wage Rate | Weekly Wage |
> |---|---|---|---|---|
> | 1 | 9-Jun-16 | 17.65 | 15 | 229.45 |
> | 2 | 2-Jun-16 | 17.65 | 15 | 229.45 |
> | 3 | 26-May-16 | 17.65 | 15 | 229.45 |
> | 4 | 19-May-16 | 17.65 | 15 | 229.45 |
> | 5 | 12-May-16 | 17.65 | 15 | 229.45 |
> | 6 | 5-May-16 | 17.65 | 15 | 229.45 |
> | 7 | 28-Apr-16 | 17.65 | 15 | 229.45 |
> | 8 | 21-Apr-16 | 17.65 | 15 | 229.45 |
> | 9 | 14-Apr-16 | 17.65 | 15 | 229.45 |
> | 10 | 7-Apr-16 | 17.65 | 15 | 229.45 |
> | 11 | 31-Mar-16 | 3.96 | 15 | 51.48 |
> | 12 | 24-Mar-16 | 3.96 | 15 | 51.48 |
> | 13 | 17-Mar-16 | 3.96 | 15 | 51.48 |
>
> Total: 2,448.94
>
> Average 188.38

Both parties filed petitions for reconsiderations, and the ALJ set forth the following additional findings in the February 15, 2018, Order:

> This matter is before the undersigned Administrative Law Judge for consideration of Plaintiff and Defendant/Employer's Petitions for Reconsideration of the Opinion, Award

and Order of January 11, 2018. Therein, Plaintiff contends that the undersigned should reconsider the award below minimum level and the application of KRS 342.140(f). Defendant/Employer contends that the undersigned should reconsider the average weekly wage finding or alternatively, the ALJ's findings that Ronald Moore was a similarly-situated employee and that KRS 342.140(1)(e) should apply.

KRS 342.281 provides that an Administrative Law Judge is limited on review on Petition for Reconsideration to the correction of errors patently appearing upon the face of the award, order or decision. The ALJ may not reweigh the evidence and change findings of facts on Petition for Reconsideration. *Garrett Mining Co. v. Nye,* 122 S.W.3d 513 (Ky. 2003). Having reviewed Defendant/Employer's Petition for Reconsideration, the undersigned notes that it is simply an impermissible re-argument of the merits of the claim, and the Petitions for Reconsideration are, therefore, OVERRULED, except the [sic] the extent for the ALJ to acknowledge a patent error as mentioned below.

KRS 342.140(f) does not apply, as Ratliff's hourly wage could be ascertained. Additionally, the Court of Appeals has determined in *Riddle v. Scott's Development*, 7 S.W.3d 385 (Ky. App. 1990), that there is no minimum death benefit in Kentucky.

As for Defendant's arguments, the ALJ based the decision on her best estimate of when work was available to other employees in a similar occupation based upon the records provided, and the undersigned does not believe there is a patent error in the calculations.

Although Mr. Moore may have had more experience than Mr. Ratliff, there is no evidence that they were working in different occupations. The ALJ acknowledged that Mr. Moore was paid more for that experience, and thus, the undersigned used Ratliff's lower wage rate to caculate [sic] the average weekly wage. The ALJ also acknowledges that Mr. Koch testified he had more work in early May or early June, and that he and Mr. Moore were working on that job, but he testified that they did not actually really get going on that job until more towards the latter part of June, and he hired several more people at that point. He did not specifically testify that Mr. Moore worked more or less during any specific time periods in the weeks leading up to the injury, but only that he hired more people. He testified he had "no clue what jobs were like" in the months leading up to the injury, but he more than likely had a couple of small concrete jobs. The ALJ averaged the number of hours based upon the total amount paid to Mr. Moore during the time period, because there was no other evidence from which to base his week by week hours.

Additionally, the ALJ acknowledges that there is a patent error, as the ALJ did not intend to find that Ratliff was employed from April 8, 2016 through June 9, 2016. The ALJ did not consider Ratliff as continuously employed from April 8, 2016 from June 9, 2016. Thus, the reason for not using "$0" as his wages during those intervening weeks. Due to this inconsistency, the ALJ finds that it is a patent error which must be corrected.

To the extent that the ALJ used the term "employed" for this time period,

> the ALJ acknowledges that this was a patent error. Thus, the ALJ finds that the end of the second to last paragraph on page 7 of the decision shall be amended to substitute the following language:
>
> "Even assuming that Ratliff's employment period was from April 8, 2016 through June 9, 2016, Ratliff was employed for less than 13 weeks. Thus, his wages..."
>
> to replace:
>
> "The ALJ finds that Plaintiff was employed for less than 13 weeks (from April 8, 2016 through June 9, 2016), and thus, his wages..."
>
> The Opinion, Award and Order shall otherwise remain as written.
>
> To clarify further, when specifically asked whether Ratliff was an employee, Mr. Koch was not sure and said he did not work for him on a regular basis, and he was at most, a limited part-time employee. He testified that he hired Ratliff before, so he would be a part-time employee. However, Ratliff was not employed continuously during this time period, as he was drug tested before being hired to perform the June 9, 2016 job. Although he was considered Defendant's employee during the times he was working, Ratliff was not continuously an employee between April 8, 2016 and June 9, 2016.

Koch Cove's first argument – that Ratliff's AWW should have been calculated pursuant to KRS 342.140(d) because he was originally hired in 2014 – lacks merit.

As noted in the January 11, 2018, Opinion, Award, and expanded upon in the February 15, 2018, Order, the ALJ determined Ratliff was employed for less than 13 weeks. In the February 15, 2018, Order, the ALJ held that, even though Koch considered Ratliff to be Koch's Cove's employee, he was not employed continuously. Also, as noted by the ALJ in the February 15, 2018, Order, when Koch was asked at his deposition whether Ratliff was an employee, "Mr. Koch was not sure and said he did not work for him on a regular basis, and he was at most, a limited part-time employee. He testified that he hired Ratliff before, so he would be a part-time employee." Also persuasive to the ALJ's determination that Ratliff was employed for less than 13 weeks was the fact he was drug tested before "being hired" to perform the June 9, 2016, job, which is indicative of non-continuous employment.

Koch's Cove's claim that Ratliff was employed from 2014 through June 9, 2016, can easily be dispensed with, as relevant case law clearly states this analysis must be made on a case-by-case basis:

> ***C & D has misstated the statutory scheme which does not turn upon the time period from an original date of hire to the date of injury, but turns upon the actual period of employment.*** The statutory language is clear that one should consider how long the

> employee "had been in the employ of the employer." While this process would be very simple in the case of continuous employment, where the work is sporadic, a determination must be made on a case-by-case basis.
>
> C & D Bulldozing Co. v. Brock, 820 S.W.2d 482, 485 (Ky. 1991). (emphasis added).

The purpose of the various methods for calculating AWW pursuant to KRS 342.140 is to obtain a realistic reflection of the claimant's earning capacity at the time of his injury. Huff v. Smith Trucking, 6 S.W.3d 819 (Ky. 1999); *see also* C & D Bulldozing v. Brock, 820 S.W.2d 482 (Ky. 1991). The ALJ has the discretion to take into consideration the unique facts and circumstances of each individual case. *Id*. The ultimate objective is to ensure the claimant's benefit rate is based upon "a realistic estimation of what the worker would have expected to earn had the injury not occurred." Desa International, Inc. v. Barlow, 59 S.W.3d 872, 875 (Ky. 2001).

As is her prerogative, in determining the most accurate methodology for calculating AWW, the ALJ has the discretion to pick and choose amongst the evidence in the record. It was well within the ALJ's discretion to determine Ratliff was not continuously employed for 13 weeks, and substantial evidence supports this

determination. This Board will not disturb the ALJ's judgment.

Koch's Cove's second argument the ALJ erred by determining Moore is a similarly situated employee because Moore's hourly rate exceeded Ratliff's lacks merit.

The ALJ provided findings in both the January 11, 2018, Opinion, Award, and Order and the February 15, 2018, Order explaining her determination Moore is a similarly situated employee. As she made clear in the January 11, 2018, Opinion, Award, and Order, the ALJ had no other information available to her from which she could estimate the number of hours a similarly situated employee would have worked other than utilizing the number of hours worked by Moore. The ALJ "believes this to be the best estimate of what hours were available to other employees in a similar occupation for purposes of calculating Ratliff's average weekly wage." The ALJ further determined that, even though Moore was paid more for his additional expertise, there is no evidence Moore and Ratliff were working in different occupations. Indeed, as testified to by Koch, Koch's Cove was involved in general construction. As substantial evidence supports the ALJ's determination Moore is a similarly situation employee, and the record does not compel a different result, we will not disturb the ALJ's

discretion in this matter. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984).

Koch's Cove's third argument is the ALJ erred by using all of Moore's second quarter earnings in calculating the number of hours Moore worked, as Koch's "testimony confirms that the majority of Mr. Moore's second quarter earnings would have been following the accident, so this cannot be substantial evidence." We disagree and affirm.

Here, the ALJ determined that, because Ratliff was employed for less than 13 weeks, KRS 342.140(e) is applicable, and Ratliff's AWW "shall be determined based upon what he would have earned had he been employed by Defendant for the full 13 weeks prior to the injury and had worked when work was available to other employees in a similar occupation." In the February 15, 2018, Order, the ALJ utilized the number of hours Moore worked at Koch's Cove during the second quarter of 2016 by dividing the "total amount paid to Mr. Moore during the time period" by $20.00, Moore's hourly rate. It is wholly insignificant that some of Moore's second quarter earnings followed Ratliff's accident, as the ALJ has the discretion to "pick and choose from the witnesses' testimony and to draw reasonable inferences from the evidence" in order to calculate a "reasonable estimate of what the claimant

probably would have earned had he worked for the full 13-week period immediately preceding his injury when work was available." Abel Verdon Construction v. Rivera, 348 S.W.3d 749, 757 (Ky. 2011). Further bolstering the ALJ's determination to utilize the number of hours worked by Moore during the second quarter of his employment with Koch's Cove in 2016 is Koch's deposition testimony indicating he had every intention of letting Ratliff continue working for him on the commercial rehabilitation project of Brooks Elementary School, the project upon which Moore was working during the second quarter of 2016. Also, as noted above, the ALJ concluded that while Moore may have had more experience than Ratliff, "there is no evidence they were working in different occupations." They were both working general construction. Consequently, within the ALJ's discretion she utilized the number of hours Moore worked during the second quarter of 2016 in making a determination, regarding Ratliff's AWW, of how many hours Ratliff would have worked when work was available to other employees in a similar occupation. We will not disturb the ALJ's determination.

Koch's Cove's fourth argument is the ALJ erred by using the entire quarter of Moore's earnings instead of using Ratliff's earnings for the nine weeks when he was "in

the employ" of Koch's Cove from April 8, 2016, through June 9, 2016, along with four weeks of Moore's earnings. For the reasons outlined above, the ALJ determined Ratliff was not a continuous employee of Koch's Cove from April 8, 2016, through June 9, 2016; therefore, she was not obligated to utilize the wages earned by Ratliff during this time period in the piecemeal manner proposed by Koch's Cove. As substantial evidence supports this conclusion, it will not be disturbed.

Finally, Koch's Cove requests this Board to amend the award "such that widow's benefits are made payable 'for so long as she is eligible to receive them in accordance with KRS 342.750 and KRS 342.730(4)'" in accordance with Parker v. Webster County Coal (Dotiki Mine), supra. We vacate the ALJ's award of weekly death benefits made to Ratliff's widow and remand.

We recently dealt with the impact of Parker in Pickett v. Ford Motor Co., Claim No. 2015-01910, rendered February 16, 2018, wherein we held as follows:

> The version of KRS 342.730(4) the Parker Court deemed unconstitutional, enacted in 1996, states in pertinent part:
>
> > All income benefits payable pursuant to this chapter shall terminate as of the

> date upon which the employee qualifies for normal old-age Social Security retirement benefits under the United States Social Security Act, 42 U.S.C. secs. 301 to 1397f, or two (2) years after the employee's injury or last exposure, whichever last occurs.

In Parker, supra, the Kentucky Supreme Court concluded the manner in which income benefits were limited in the 1996 version of KRS 342.730(4) is unconstitutional. In so ruling, the Supreme Court stated, in part, as follows:

> ***[T]he equal protection problem with KRS 342.730(4) is that it treats injured older workers who qualify for normal old-age Social Security retirement benefits differently than it treats injured older workers who do not qualify.*** As Justice Graves noted in his dissent in *McDowell*, "Kentucky teachers ... have a retirement program and do not participate in social security." 84 S.W.3d at 79. Thus, a teacher who has not had any outside employment and who suffers a work-related injury will not be subject to the limitation in KRS 342.730(4) because that teacher will never qualify for Social Security retirement benefits. There is no rational basis for treating all other workers in the Commonwealth differently

> than teachers. Both sets of workers will qualify for retirement benefits and both have contributed, in part, to their "retirement plans." However, while teachers will receive all of the workers' compensation income benefits to which they are entitled, nearly every other worker in the Commonwealth will not. This disparate treatment does not accomplish the goals posited as the rational bases for KRS 342.730(4). The statute does prevent duplication of benefits, but only for non-teachers because, while nearly every other worker is foreclosed from receiving "duplicate benefits," teachers are not.
>
> Id. at 768 (emphasis added).

The Supreme Court determined the 1996 version of KRS 342.730(4) does not pass constitutional muster because it treats injured older workers in the Commonwealth who *do not* qualify for old-age Social Security benefits, such as teachers, differently from all other injured older workers in the Commonwealth who qualify for old-age Social Security benefits. That said, the Supreme Court's pronouncement in Parker lacks guidance as to how income benefits should now be calculated for injured older workers. In other words, should income benefit calculations for injured older workers be devoid of any age-related restrictions or should income benefit calculations revert back to the previous version of KRS 342.730(4) immediately preceding the 1996 version? Having had another opportunity to offer guidance in Cruse v. Henderson, Not To Be Published,

2015-SC-00506-WC (December 14, 2017), the Supreme Court declined. Thus, this Board must turn to other sources in order to address this inquiry.

The previous version of KRS 342.730(4) reads as follows:

> If the injury or last exposure occurs prior to the employee's sixty-fifth birthday, any income benefits awarded under KRS 342.750, 342.316, 342.732, or this section shall be reduced by ten percent (10%) beginning at age sixty-five (65) and by ten percent (10%) each year thereafter until and including age seventy (70). Income benefits shall not be reduced beyond the employee's seventieth birthday.

The above-cited language does not induce the same constitutional quandary identified by the Parker Court, as the tier-down directed in the previous version of KRS 342.730(4) does not differentiate between injured older workers eligible for old-age Social Security benefits and those who are not. All workers injured before the age of sixty-five are subject to the tier-down provisions regardless of their eligibility for Social Security benefits. The previous version of KRS 342.730(4) does, however, differentiate between injured younger workers and injured older workers, because those injured above the age of sixty-five are not subjected to the tier-down. The Parker Court has already addressed the rational basis of providing for such a distinction:

> The rational bases for treating younger and older

> workers differently is: (1) it prevents duplication of benefits; and (2) it results in savings for the workers' compensation system. Undoubtedly, both of these are rational bases for treating those who, based on their age, have qualified for normal Social Security retirement benefits differently from those who, based on their age, have yet to do so.
>
> Id. at 768.

However, there must be a determination of whether the Supreme Court's pronouncement in Parker revives the previous iteration of KRS 342.730(4).

KRS 446.160 states as follows:

> If any provision of the Kentucky Revised Statutes, derived from an act that amended or repealed a pre-existing statute, is held unconstitutional, the general repeal of all former statutes by the act enacting the Kentucky Revised Statutes ***shall not prevent the pre-existing statute from being law if that appears to have been the intent of the General Assembly***.
> (emphasis added).

In making an educated assessment of the legislative intent at the time the current version of KRS 342.730(4) was enacted in 1996, we turn to a contemporaneous provision, contained in the 1996 legislation, in which the legislature addressed the dire need to

preserve the long-term solvency of the Special Fund, now the Division of Workers' Compensation Funds, which reads as follows:

> **Section 90.** The General Assembly finds and declares that workers who incur injuries covered by KRS Chapter 342 are not assured that prescribed benefits will be promptly delivered, mechanisms designed to establish the long-term solvency of the special fund have failed to reduce its unfunded competitive disadvantage due to the cost of securing worker's vitality of the Commonwealth's economy and the jobs and well-being of its workforce. Whereas it is in the interest of all citizens that the provisions of this Act shall be implemented as soon as possible, an emergency is declared to exist, and this Act takes effect upon its passage and approval by the Governor or upon its otherwise becoming a law.

The language of Section 90 indicates the legislature, at the time the 1996 version of KRS 342.730(4) was enacted, intended to preserve the solvency of the Special Fund. Indeed, the language used in Section 90 speaks to this intent as being "an emergency." This legislative intent cannot be ignored in the wake of the Supreme Court's determination the 1996 version of KRS 342.730(4) is unconstitutional. This expressed concern certainly bolsters the conclusion the legislature contemplated a revival of the tier-down

> provisions in the previous version of KRS 342.730(4).
>
> Accordingly, we hold that income benefits are to be calculated pursuant to the tier-down formula as set forth in the pre-existing version of KRS 342.730(4) in place when the statute in question was enacted in 1996. As the record indicates Pickett was sixty at the time of the July 13, 2015, injury to his left shoulder, and the ALJ awarded PPD benefits commencing on July 13, 2015, we vacate the ALJ's award of PPD benefits which are "subject to the limitations set forth in KRS 342.730(4)" and remand for a revised calculation of PPD benefits and an amended award consistent with the views set forth herein.

KRS 342.750(7) clearly limits weekly death benefits paid to spouses and dependents by virtue of KRS 342.730(4); therefore, the logic expounded in Pickett regarding the impact of Parker on income benefits for claimants injured before the age of 65 who subsequently qualify for Social Security benefits must also apply to weekly death benefits payable to their spouses and dependents. We have consistently adhered to our decision since Pickett, and we will continue to do so until instructed to do otherwise. Consequently, we vacate the ALJ's award of weekly death benefits to Ratliff's widow and, on remand, the ALJ shall enter an amended order clearly noting the widow's death benefits are subject to

the tier-down provision set forth in the pre-existing version of KRS 342.730(4).[2]

The first argument on cross-appeal is the ALJ was obligated to use KRS 342.140(1)(f) in calculating AWW as Ratliff's hourly wage could not be ascertained. We disagree and affirm.

The ALJ, in both the January 11, 2018, Opinion, Award, and Order and the February 15, 2018, Order, detailed why she relied upon $15.00 an hour as Ratliff's hourly wage. The ALJ stated that she relied upon Koch's deposition testimony indicating he paid Ratliff $15.00 per hour. As noted by the ALJ in the January 11, 2018, Opinion, Award, and Order, the ALJ believed Koch's testimony is consistent with Ratliff's April 2016 paycheck. While this Board recognizes other evidence filed on behalf of Ratliff indicates an hourly wage higher than $15.00 per hour, specifically information from the U.S. Bureau of Labor Statistics indicating a mean average wage for construction workers in Jefferson County of $21.86 per hour, the ALJ was not required to rely upon this evidence. As fact-finder, the ALJ has the sole authority to determine the weight,

[2] The Supreme Court's holding in Morsey, Inc. v. Frazier, 245 S.W.3d 757 (Ky. 2008) and the Court of Appeals' holding in Campbell v. Hauler's Inc., 320 S.W.3d 707 (Ky. App. 2010) as to when the widow's benefits terminated pursuant to the 1996 version of KRS 342.730(4) were vitiated by the holding in Parker.

credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence supporting a different outcome than reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

As substantial evidence supports the ALJ's determination to use an hourly wage of $15.00 per hour in her calculation of Ratliff's AWW, we affirm.

The second argument on cross-appeal is that Ratliff's widow and two dependent children are entitled to a collective minimum weekly death benefit of $159.72 per week, which reflects the minimum weekly indemnity benefit for calendar year 2016. We disagree and affirm.

KRS 342.750(b) states as follows:

> To the widow or widower, if there is a child or children living with the widow or widower, 45 percent of the average weekly wage of the deceased, or 40 percent, if such child is not or such children are not living with a widow or widower, and in addition thereto, 15 percent for each child. Where there are more than two (2) such children, the indemnity benefits payable on account of such children shall be divided among such children, share and share alike.

The November 29, 2017, Affidavit of Kimberly Tyler, Ratliff's widow, states as follows:

> 1. I am a resident [sic] the Commonwealth of Kentucky, am more than 18 years old and the statements made herein are true and accurate to the best of my information, belief and knowledge.
>
> 2. My date of birth is January 27, 1985 and I married Kenneth Shane Ratliff on April 10, 2010 and was married on the date of his death.
>
> 3. Kenneth Shane Ratliff and I had two children, Jessica Ratliff, date of birth January 22, 2010 and James Ratliff, date of birth October 3, 2011.
>
> 4. Both myself and the two children were living in the household with my husband on June 9, 2016, the date of my husband's work-related death.

In the case *sub judice*, the ALJ relied upon the representations made in the affidavit and followed the statutory scheme as outlined above to calculate the weekly death benefits of Ratliff's widow and two dependent

children. The law is clear that the Workers' Compensation Act does not provide for a minimum weekly death benefit. KRS 342.750; Riddle v. Scotty's Development, Inc., 7 S.w.3d 385 (Ky. 1999). Therefore, we reject the argument regarding a minimum weekly death benefit of $159.72 per week to Ratliff's widow and two dependent children.

Accordingly, on appeal, the January 11, 2018, Opinion, Award, and Order and the February 15, 2018, Order, concerning the award of weekly income benefits to Ratliff's widow, Kimberly Tyler, are **VACATED**. The claim is **REMANDED** for entry of an award to Kimberly Tyler imposing the tier-down provisions of the 1994 version of KRS 342.730(4). Regarding all remaining issues raised on appeal, the January 11, 2018, Opinion, Award, and Order and the February 15, 2018, Order are **AFFIRMED**. On cross-appeal, the January 11, 2018, Opinion, Award, and Order and the February 15, 2018, Order are **AFFIRMED**.

ALL CONCUR.

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